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*Attorneys for Plaintiff Cisco Systems, Inc.*

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION**

CISCO SYSTEMS, INC.,

Plaintiff,

vs.

ARISTA NETWORKS, INC.,

Defendant.

CASE NO. 5:14-cv-5344-BLF

**CISCO'S OBJECTIONS TO ARISTA'S  
12/5/2016 TRIAL EXHIBITS AND  
DEMONSTRATIVES**

Dep't: Courtroom 3, 5<sup>th</sup> Floor  
Judge: Hon. Beth Labson Freeman

1 Cisco objects as follows to Arista's December 5 trial exhibits and demonstratives.

2 Most of Arista's proposed exhibits are inadmissible hearsay for which no non-hearsay  
3 purpose has been offered. Many of the objections Cisco noted as to Arista's disclosures for  
4 December 2 (ECF 697) apply equally to this new set of exhibits. Although the parties have  
5 spoken, Arista has not communicated the basis of any disagreement with Cisco's objections.

6 The media publications in Exhibits 5416, 6223, 6505, 7005, 7731, 7732 and 8199 "are by  
7 their very nature hearsay evidence and are thus inadmissible if offered to prove the truth of the  
8 matter asserted." *AMFS LLC v. UPS*, 105 F. Supp. 3d 1061, 1070 (C.D. Cal. 2015). The same is  
9 true of Exhibit 8206, an Arista press release. Arista has not identified any potentially non-hearsay  
10 purposes for these materials. Should Arista identify a proper purpose, these exhibits should still  
11 be excluded as more unfairly prejudicial than probative. The disclosed articles purport to provide  
12 laudatory technical or financial analysis (Exs. 5416, 6223, 7005, 8199) or state conclusions about  
13 whether "Cisco's CLI has become a standard in the industry" (Exs. 6505, 7731, *see also* Ex.  
14 7732). Such out-of-court statements of heavily contested facts and opinions should not go to the  
15 jury under the guise of, for example, demonstrating general awareness of Arista in the market.

16 No non-hearsay purpose has been offered for the litany of emails included in Arista's  
17 disclosures. Exhibits 4353, 6155,<sup>1</sup> 6450, 6515, 6554, 6555, 7744, 7748, 7757, 7767, 7787, 7788,  
18 7812, 7868, 7873, 7876, 7878, 7883 and 9069 are all emails sent and/or received by Arista  
19 employees. Although many of these emails appear to have been sent in the general course of  
20 business, the business record exception to hearsay requires more: the record must have been "kept  
21 in the course of a regularly conducted activity," and making the record must be "a regular practice  
22 of that activity." Fed. R. Evid. 803(6). There is no evidence that would support the idea that  
23 Arista so relied on every private email its employees ever sent one another that every Arista email  
24 carries an adequate guaranty of reliability to be admitted into evidence. *See Monotype Corp. v.*

25  
26  
27 <sup>1</sup> Exhibit 6155 purports to contain within it "the internal tribute Cisco wrote" to Ms. Ullal.  
28 That Fed. R. Evid. 801(d)(2) may arguably save this exhibit from being hearsay-within-hearsay  
does not remedy or satisfy any hearsay exception for the email itself.

1 *Int'l Typeface Corp.*, 43 F.3d 443, 450 (9th Cir. 1994); *Venture Corp. Ltd. v. Barrett*, 2015 WL  
2 2088999, \*2 (N.D. Cal. May 5, 2015).

3 At this juncture, these emails are not consistent prior statements admissible under Fed. R.  
4 Evid. 801(d)(1)(B). It is doubtful that they would be under any circumstance, as this Rule is not a  
5 general invitation to admit hearsay evidence of a witness's motives, but instead an avenue "to  
6 *rebut* an express or implied charge that the declarant *recently* fabricated [her testimony] or acted  
7 from a *recent* improper influence or motive in so testifying." *Id.* (emphasis added). "The Rule  
8 permits the introduction of a declarant's consistent out-of-court statements to rebut a charge of  
9 recent fabrication or improper influence or motive *only when those statements were made before*  
10 the charged recent fabrication or improper influence or motive." *Tome v. United States*, 513 U.S.  
11 150, 167 (1995) (emphasis added).

12 Even more problematic is the suggestion that Exhibits 7777 and 7790, emails Arista's  
13 CEO exchanged with a customer and a financial advisor, should be admitted into evidence. These  
14 effusively self-serving documents should be excluded under any analysis of Fed. R. Evid. 403 and  
15 802, and particularly so where Arista has successfully excluded testimony about general lessons  
16 Cisco employees learned from customers (Trial Tr. 11/28/2016 (ECF 687) at 467) and even  
17 objected to a yes or no question about whether a witness has received customer feedback  
18 regarding the help descriptions in Cisco's CLI (Trial Tr. 11/29/2016 (ECF 691) at 737-38).

19 The Arista advertising materials disclosed for use with these witnesses should also be  
20 excluded as improper hearsay. Exhibits 267, 6095, 6450, 6554, 7734, 7892, 7893, 7894, and 7899  
21 all appear to be presentations designed by Arista for outside audiences. There is thus greater  
22 reason to doubt the reliability of these documents than there was to doubt the reliability of the  
23 presentation, authored by a witness for Cisco's internal use, which Arista's counsel derided as  
24 "nothing but a marketing puff piece" and which the Court excluded as hearsay. Trial Tr.  
25 11/28/2016 (ECF 687) at 273. Few of the presentations disclose their authors and Arista has not  
26 informed Cisco of any facts which would support admission of these presentations as business  
27 records. Were such facts to emerge, or were Arista to articulate a non-hearsay purpose for these  
28

1 exhibits (which it has not yet attempted to do), Fed. R. Evid. 403 would still bar the admission of  
 2 many of these exhibits into evidence based on their self-serving and promotional nature.

3 Arista's public white papers, Exhibits 6284, 6423, 7357, 7408, 7411, 7724, and 7839, also  
 4 serve promotional purposes and therefore do not qualify as business records. These documents  
 5 contain self-serving descriptions of Arista's products and services. In contrast to internal manuals,  
 6 such as Exhibit 6218, which appear to be the types of materials Arista may have actually relied  
 7 upon in the course of its business, Arista's statements to customers through white papers cannot be  
 8 relied upon for the truth of the matter asserted. *See, e.g.*, Ex. 7357 at 956 (EOS "is the most  
 9 advanced, resilient and programmable operating system"). Because Arista has articulated no other  
 10 purpose for these exhibits, they should be excluded as improper hearsay.

11 Exhibits 7836, 7839, 8133, 9067, 9068 and 9069, documents that purport to instruct Arista  
 12 employees in matters of conduct and ethics, are inadmissible hearsay to the extent they are offered  
 13 for the truth of the matters asserted. Arista has not identified any alternative purpose for these  
 14 documents or any others since their initial disclosure of exhibits to be used with witnesses. These  
 15 documents, which contain numerous self-serving statements made by unnamed authors, should not  
 16 go to the jury.

17 Many of the exhibits Arista has disclosed do not, on their face, indicate the basis of the  
 18 witness's personal knowledge of the document's contents. Cisco reserves the right to object to  
 19 any attempt to introduce an exhibit without a proper foundation.

20 Finally, Cisco objects to slide 2 of the demonstrative disclosed for use with Mr. Holbrook  
 21 as hearsay; the slide incorporates part of Exhibit 6095 (discussed above), not Exhibit 168.

23 Dated: December 2, 2016

Respectfully submitted,

24 /s/ John M. Neukom

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